No. 83-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS, *et al.*,

Petitioners,

v.

PHYLLIS BALL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a non-profit corporation whose members are all the Catholic Bishops in the United States. The interests of the USCC include the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its views in litigation touching important socio-moral and other issues pertinent to its areas of activity, particularly when they may affect the Catholic Church or its people in the United States. Through their counsel, all parties have consented to the appearance of this *amicus*.

The United States Court of Appeals for the Sixth Circuit has held that the provision of Shared Time and Community Education courses on premises leased from religiously affiliated nonpublic schools volates the Establishment Clause of the First Amendment.[1] The courses are limited to secular subjects and are taught by employees of the School District of the City of Grand Rapids. A reversal of the Court of Appeals would enable the School District to fulfill the responsibility it has undertaken to provide important educational services to children within its community, includng those attending religiously affilated schools, Catholic and others.

SUMMARY OF ARGUMENT

The secular courses offered by the School District of the City of Grand Rapids to children attending nonpublic, religiously affiliated schools are clearly sustainable under the relevant decisions of this Court. This *amicus* will not repeat Petitioner's arguments supporting that conclusion. Rather, it will attempt to serve the Court by suggesting an approach to the three-part *Lemon* test[2] which (a) emphasizes the vital public interest in education of youth *and* (b) requires a demonstrable, concrete threat to authentic constitutional values before the Establishment Clause is interposed to subvert important educational programs.

Long ago Chief Justice John Marshall counselled that lawful legislation should not be invalidated for constitutional reasons on the basis of "slight implication and vague conjecture." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). This admonition underscores well the need for a concrete threat to authentic Establishment Clause values before that Clause is utilized to subvert the legitimate efforts of government in the important area of educa-

[1] U.S. Constitution Amendment I provides in relevant part that "Congress shall make no law respecting an establishment of religion. . . ."

[2] As stated in *Lemon* v. *Kurtzman*, the test is: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive government entanglement with religion. 403 U.S. 602, 612-13 (1971).

tion. The three-part test can be a valid constitutional standard only when it is rooted in the authentic objectives of the Establishment Clause, according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984).

The words of the Establishment Clause represent a compromise between the versions finally approved by the House and Senate during the First Congress. The House and Senate proceedings which forged the language of the Clause demonstrate, as Madison himself explained during the House debate, that the objective was to forbid the establishment or preferment of one or more religions by the new federal government. History had taught the founders that such conditions lead to infringement of religious liberty. Analysis of those proceedings illumines the words of the Clause to the point of undeniable clarity of purpose.

The Establishment Clause was meant to lay down a principle. Its explicit proscriptions against establishment and preferment constitute the precise judgment of the framers. They did not explicitly or impliedly classify aid to religion, churches or religious groups as inherently objectionable, hardly surprising given the diverse values and practices of the day. This conclusion is reinforced by actions of the First Congress (*e.g.*, appointment of paid Congressional chaplains) and other early acts of the federal government (*e.g.*, issuance of patents for land, without charge, to religious organizations, and providing funds to support schools to educate Indians operated by various religious organizations).

The seminal cases, notably *Everson* v. *Board of Education*, 330 U.S. 1 (1947), blurred the constitutional vision by attributing to the Establishment Clause a broad, no-aid-to-religion purpose. The Court has cautioned against undue reliance on the *Everson* dicta, and pursued the common sense course of benevolent neutrality. Nonetheless, *Everson's* conclusions have influenced the application of the three-part test, resulting at times in the invalidation of programs involving no concrete threat of establishing religion within the meaning of the Establishment Clause, *e.g.*, field trip transportation to government and cultural centers [*Wolman* v. *Walter*, 433 U.S. 229, 254 (1977)]; loans of secular educational materials (*e.g.*, maps, charts, and laboratory equip-

ment) [*Meek* v. *Pittenger*, 421 U.S. 349, 365 (1975)]; and payments for state-mandated services [*Levitt* v. *Committee For Public Education and Religious Liberty*, 413 U.S. 472 (1973)].

The Court's recent cases make clear that the contours of Establishment Clause analysis are still evolving. This *amicus* suggests that Establishment Clause analysis will be enhanced by applying the three-part test so as to:

1. give great weight to the important public interest served by the government action which is said to offend the Establishment Clause [*Secular Purpose Test*], and

2. require a *showing* of a concrete threat to authentic Establishment Clause values which obliges the Court to subvert the exercise of constitutional authority by state and local governments [*Primary Effect and Excessive Entanglement Tests*].

This *amicus* respectfully submits that more vigorous demands upon challenges to otherwise legitimate and necessary public acts will accord with the wisdom of Chief Justice John Marshall and, in the end, best serve society's interest in meeting its needs while avoiding real establishment concerns.

ARGUMENT

I

THE "THREE-PART" TEST INVOLVES A "TWO-PART" ISSUE AND SHOULD BE REASSESSED. THE CONSTITUTIONAL AUTHORITY OF STATE AND LOCAL GOVERNMENTS TO PROVIDE FOR THE EDUCATION OF YOUTH FURTHERS A VITAL NATIONAL INTEREST *[SECULAR PURPOSE]* WHICH SHOULD NOT BE UNDERMINED EXCEPT TO THWART CONCRETE THREATS TO AUTHENTIC CONSTITUTIONAL VALUES *[PRIMARY EFFECT/EXCESSIVE ENTANGLEMENT]*.

The "three-part" test was first articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971). The results of its application strongly suggest the need to reassess its efficacy as an analytical tool. The Court has candidly recognized the inherent limitations of the test:

> "[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."

Meek v. *Pittenger*, 421 U.S. 349, 359 (citation omitted) (1975); cf. *Mueller* v. *Allen*, 103 S. Ct. 3062, 3066 (1983); *Tilton* v. *Richardson*, 403 U.S. 672, 677-78 (1971). The Court has also pointedly observed that the flexibility of approach so evident in the cases awaits a "more encompassing construction of the Establishment Clause." *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646, 662 (1980).

Although the contours of analysis remain in flux, the Court's most recent decisions have placed appropriate emphasis on the authentic purposes of the Establishment Clause as they are rooted in its history. That has led not only to the enhancement of the "three-part" test [*Mueller* v. *Allen*, 103 S. Ct. 3062 (1983); *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984)], but also to the resolution of issues without recourse to it. *Marsh* v. *Chambers*, 103 S. Ct. 3330 (1983). The utility of the "three-part" test may justifiably be questioned. Surely it has wrought the invalidation of public acts with concededly secular purposes and undeniably worthy social ends. In all events, however, what matters is the Court's renewed insistence that public acts for the common good shall be upheld save in those rare cases involving a concrete threat to authentic constitutional values.

In the end, the question is whether the state has exercised its constitutional authority in a way that so trenches upon authentic Establishment Clause values that the Court is obliged by constitutional duty to defeat its legitimate objectives. Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).

A. Establishment Clause Analysis ("Three-Part" Test) May Be Enriched By The Counsels Of Chief Justice John Marshall Which Require A Concrete Threat To Authentic Constitutional Values Before Otherwise Lawful Public Acts May Be Invalidated.

Chief Justice John Marshall long ago counseled:

> "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative

> in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability [sic] with each other."

Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). The enduring wisdom of this admonition unites the principles of federalism, separation of powers, and judicial restraint. It augments the jurisprudential core for the three-part test, and reinforces the Court's insistence of late that public acts shall not be stricken save for compelling constitutional cause.

Although the Chief Justice wrote in regard to a state constitution, his wisdom applies no less to cases involving federal constitutional constraints on acts of government. "It has been repeatedly said by this Court, that to pronounce a law of one of the sovereign states of this union to be a violation of the [C]onstitution is a solemn function, demanding the gravest and most deliberate consideration." *Butler* v. *Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). A scrupulous fidelity to principles of federalism is of foremost importance when judging the constitutionality of state action. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 44 (1973). The delicacy of that function is attributable, in part, to the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 571 (1947).

Chief Justice Marshall's formulation contains the fundamental analytical elements subsumed under the "three-part" test. On the one hand, there must be a genuine, secular or public purpose and a due regard for the constitutional authority of the people to achieve that purpose by the means they deem necessary or appropriate. On the other, those means may not pose a threat to authentic Establishment Clause values which is so real and concrete, so beyond "slight implication and vague conjecture," that the case is not "doubtful" and "the judge feels a clear and strong conviction of their incompatability [sic] with each other." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) at 128. The former pertains, obviously, to the "secular purpose" prong of the "three-part" test. The latter implicates the "primary effect" and "excessive entanglement" prongs, *and* any other means of investigation and discernment which seeks to identify serious constitutional mischief.

B. The Generative History Of The Religion Clauses Clearly Reveals They Were Intended To Protect Religious Liberty Against Infringement, Including That Which Can Be Wrought By An Established State Religion.

The authentic values and objectives of the Establishment Clause were somewhat blurred in the seminal cases because of an insufficient consideration of the illuminating House and Senate debates which forged the Clause as part of the First Amendment (discussed *infra* at 20-21). Following is the summary which was part of this *amicus'* brief in *Mueller* v. *Allen*, *supra*.

1. Constitutional Convention Of 1787 And Ratification By States

Religicn was not a major concern of the Constitutional Convention of 1787. The only reference to religion in the proposed Constitution appeared in Article VI which provided, in part, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[3]

During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia[4] specifically addressed the issue of religious freedom. The ratifying acts of four of them (New Hampshire excepted) addressed the issue of an established religion in

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[3] *V Debates on the Adoption of the Federal Constitution* 564 (2d ed. J. Elliot ed. 1836).

[4] Of these states Rhode Island and New York did not make a recommendation for a religious amendment but each did include in its ratifying act a declaration of principles which included statements on religious liberty. *See* notes 6 and 7 *infra*.

terms of preferring one religion over others. Virginia proposed the following amendment on June 27, 1788:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[5] (Emphasis added.)

The scored language appeared in virtually identical form in the ratifying acts of New York,[6] Rhode Island,[7] and North Carolina.[8] Desirous of protecting its own religious establishment,[9] New Hampshire proposed an amendment reading: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[10]

In contrast, there was substantial opinion that the explicit protection of religious liberty was unnecessary because the federal government lacked authority over religion, and because adequate protection was supplied by the ban on religious tests in Article VI and by the multiplicity of sects in the country. James Madison was among those who shared this view.[11]

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[5] III Elliot, *supra* note 3, at 659.

[6] I *id.* at 328.

[7] *Id.* at 334.

[8] IV *id.* at 244.

[9] *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemporary Problems, 3, 11 (1949). New Hampshire's constitution on the date it ratified the Constitution contained a provison under which the legislature could authorize towns, corporate bodies, or religious societies to make provision at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. N.H. Const. of 1784, Pt. I, Art. I, Section VI, 4 *American Charters, Constitutions and Organic Laws*—1492-1908, 2454 (F. Thorpe ed. 1909).

[10] I Elliot, *supra* note 3, at 326.

[11] III *id.* at 330.

2. Textual Development Of Religion Clauses—The House

The wording of the Religion Clauses was a compromise between the House and Senate versions.[12] Although there is no record of debates pertaining to the compromise, there is an ample record of the House and Senate proceedings.

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[12]

HOUSE LANGUAGE	SENATE LANGUAGE
Madison's Proposal—June 8 The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.	*September 3* Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.
Select Committee—July 18 No religion shall be established by law, nor shall the equal rights of conscience be infringed.	Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
Livermore's Language—August 15 Congress shall make no laws touching religion, or infringing the rights of conscience.	Congress shall make no law establishing any particular denominaton of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
Ames Language—August 20 Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.	Congress shall make no law establishing religion or prohibiting the free exercise thereof.
Final Text—August 24 Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.	*Final Text—September 9* Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .

COMPROMISE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The major proceedings in the House took place on August 15, 1789, although final action did not occur until August 24th.

Madison Introduces First Version. The first version of the Religion Clauses was among a number of amendments to the Constitution proposed by Madison on June 8, 1789. It provided:

> The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established,* nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789) (emphasis added). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution," *id.*, and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 433.

Select Committee's Version. The amendments were referred to a Select Committee. Because of the diversity of views on religious liberty among the states, it is important to note the Committee consisted of one representative (including Madison) from each state. *Id.* at 665. The Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been deleted.[13] Deletion of that word reflected a concern that the new government might be viewed as national rather than federal, with authority over state practices beyond its enumerated powers (discussed *infra* at 14).

Madison Explains Intent. On August 15th the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730. He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and

[13] National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

establish a national religion; to prevent these effects he presumed the amendment was intended." *Id.*

Concern Amendment Might Harm Religion. The language of the Select Committee's proposal ("No religion shall be established by law . . . .") evoked limited concern that it might be construed adversely to religion. Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." *Id.* at 729.[14] Benjamin Huntington of Connecticut agreed with Madison's statement of the intent, but he also expressed concern "that the words might be taken in such latitude as to be extremely harmful to the cause of religion." 1 *Annals* at 730. To illustrate, Huntington suggested the inability of a federal court to compel persons to support the religious societies to which they belonged, "for a support of ministers, or building of places of worship might be construed into a religious establishment." *Id.* At the time, Connecticut authorized religious societies to tax their members for support.[15]

Madison Restates Intent. To assuage concerns such as those expressed by Sylvester and Huntington, Madison moved to insert the word "national" before religion which he thought "would point the amendment directly to the object it was intended to prevent." 1 *Annals* at 731. He "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*

Samual Livermore of New Hampshire was not satisfied with Madison's motion but did not elaborate on his objections *Id.* Elbridge Gerry of Massachusetts also objected to the insertion of the word "national." Gerry's discussion reflected concerns expressed by opponents of the Constitution in state ratifying con-

[14] At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. *See* W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 7 (1978).

[15] *See* I A. Stokes, *Church and State in the United States* 411-12 (1950).

ventions that the Constitution established a national government rather than a federal government. *Id.* Madison withdrew his motion, but denied insertion of the word "national" would imply the government was a national one. *Id.*[16]

Livermore's Amendment. Livermore moved to amend the language to read "that Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals* at 731. This proposal is identical, except for a stylistic change, to that recommended by New Hampshire when it ratified the Constitution, *supra* at 8, and can be attributed to a desire to protect her own religious establishment.[17] Livermore's proposal, which passed on August 15 without any recorded debate, was not the language finally adopted by the House.

Final House Text. On August 20th the House passed the motion of Fisher Ames of Massachusetts (the last state to abandon an established religion in 1833) to change the wording to "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 *Annals* at 765. With minor stylistic changes, it was ultimately sent to the Senate on August 24th, *Id.* at 778. The *Annals of Congress* do not record the debate, if any, on the Ames wording.

Insofar as establishment is concerned, the Ames and House versions are indistinguishable in substance from that proposed by the Select Committee. Madison's explanations of intent give importance to this fact.

3. Textual Development Of Religion Clauses—The Senate

On September 3rd the Senate twice agreed to amend the language approved by the House. First, it approved this language: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[18] The Senate then rejected two other versions of the amendment[19] and a motion that the entire amendment be stricken. I DePauw, *supra* note 18 at 151. The Senate finally approved: "Congress shall make no law establishing religion or prohibiting the free exercise thereof." *Id.*

On September 9th the Senate passed its final version, to which it added other guarantees of liberty (free speech, free press, peaceable assembly and petition). The Religion Clauses read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ." *Id.* at 166. There are no records of the debates in the Senate.

4. Ratification By The States

The Bill of Rights was ratified by the states with a notable lack of comment on the First Amendment.[20] Only in the Virginia Senate was concern expressed that the First Amendment was not broad enough to prevent preferential treatment among religions.[21]

5. Analysis—Establishment Clause Language

Whatever may be said of the clarity of the Establishment Clause considered *in vacuo*, its precise meaning emerges when

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[16] In the course of debate, Gerry had suggested that the amendment would "read better if it was that no religious doctrine shall be established by law." I *Annals* at 730. Roger Sherman of Connecticut thought the amendment unnecessary because Congress had no authority whatever delgated by the Constitution to make religious establishments. *Id.* Daniel Carroll of Maryland was in favor of the amendment because it would tend to conciliate the minds of those who felt the rights of conscience were not well secured under the constitution. *Id.*

[17] Corwin, *supra* note 9.

[18] I *Documentary History of the First Federal Congress of the United States* 151 (L. DePauw ed. 1972).

[19] The rejected versions were (i) "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and (ii) "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof nor shall the rights of conscience be infringed." *Id.*

[20] C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment*, 157 (1963).

[21] On December 12, 1789 the Virginia Senate expressed grave disappointment over the First Amendment, fearing that it would "be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia." Journal of the Senate of the Commonwealth of Virginia, 1785-1790, at 62-63 (1828).

the words are illumined by the process which forged them. The language purposefully and precisely effectuates the readily identifiable objectives of its framers. Had the Establishment segment of the Religion Clauses emerged in the versions previously considered in House and Senate, there would be no doubt that its objectives were the actual establishment or preference of one or more religions. That was the precise concern of four of the five states which requested such an amendment when they ratified the Constitution. That was the precise objective stated and restated by Madison as sponsor in the House.

There was no tension or doubt related to these objectives, but the choice of words to reach them did engender certain anxieties born of other concerns. References to "national" religion evoked fears of an implication that the new government would be "national" and not "federal." However, more important for present purposes was the concern that the Religion Clauses might interfere with the autonomy of the states in religious matters, particularly the states which still countenanced preferred religion to one degree or another. Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause.[22]

As noted, the Religion Clauses are a House-Senate compromise. The task was to agree on language that would meet the major objectives of the recommending states as described by Madison, but which would respect other concerns of his peers. The language finally selected accomplishes these objectives in a skillful manner and becomes quite unambiguous in light of the concrete realities. The phrase "respecting an establishment" had two jobs to do, *i.e.* prevent Congress from establishing or favoring a national religion, and prevent Congress from interfering with state religious practices. It did both well, and only violence to its purpose can ensue if suggestions of basic ambiguity are

[22] *See* Corwin, *supra* note 9, at 10; Malbin, *supra* note 14, at 17; J. Story, *Commentaries on the Constitution of the United States* 731 (1833).

allowed to force other basic objectives upon the Establishment Clause.

The phrase "respecting an establishment" cannot reasonably be read to mean concerning or touching upon religion. Indeed, that was the terminology of Livermore's proposal which was eventually rejected. The word "establish," or its derivatives, was consistently used to refer to preferred religions in the amendments recommended by the states, by Madison in the House debate, and in versions of the measure in both House and Senate. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to expand the meaning of "an establishment of religion" or the scope of the Clause. As noted, the use of "respecting" made clear that Congress was also prohibited from passing laws affecting state establishments.[23]

The language of the Clause does not concern itself with religion in general but with the particular problem of *an establishment* of religion. There was no concern expressed during the August 15 debate that Congress might enact a law beneficial to religion or religious institutions. Such benevolence was not perceived as an evil (discussed *infra* at 21-23). Had this been the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion" without introducing the more limited concept of "an establishment of religion."

It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). However, as demonstrated, such terminology was rejected by the First Congress for the reasons discussed *supra* at 14.

6. Establishment And Religious Liberty

The Establishment Clause is part of the Bill of Rights. The canon *ejusdem generis* suggests, and the history of the Religion

[23] Malbin, *supra* note 14, at 16.

Clauses requires, that the Establishment Clause be viewed as a means for protecting individual liberty. *See* Madison's explanation of intent, *supra* at 10. Especially is this so under the Fourteenth Amendment which applies the Establishment Clause to the states. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom.

The Establishment Clause has a functional relationship to religious liberty. As the Court has noted, it reflects the experience of its framers that officially preferred or established religion generates religious intolerance and persecution. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 221-22 (1963); *Engel* v. *Vitale*, 370 U.S. 421, 430-32 (1962); *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose no threat to religious freedom.

C. Properly Applied, The Three-Part Test Will Subvert Only Those Public Acts Which Pose A Genuine And Concrete Threat To Authentic Establishment Clause Values.

No rule has been framed delineating the precise limits of the reach of the Establishment Clause. *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984). It is not the purpose of this *amicus* to suggest one. Flexibility is necessary to identify concrete threats to Establishment Clause values in modern society. Cf. *Committee For Public Education, Etc.* v. *Regan*, 444 U.S. 646, 662 (1980). This *amicus* does urge the Court, however,

1. to give great weight to the important public interest served by the government action which is said to offend the Establishment Clause *[Secular Purpose Test]*, and

2. to require a *showing* of a concrete threat to authentic Establishment Clause values which obliges the Court to subvert the exercise of constitutional authority by state and local governments *[Primary Effect and Excessive Entanglement Tests]*.

This *amicus* respectfully submits that more vigorous demands upon challenges to otherwise legitimate and necessary public acts will accord with the wisdom of Chief Justice John Marshall and, in the end, best serves society's interest in meeting its needs while avoiding real establishment concerns.

1. Secular Purpose—An Important Factor In Establishment Clause Analysis Which Gives Due Recognition To Government's Exercise Of Constitutional Authority.

Pursuing its responsibility and broad interest in education, a city or state will often provide educational services to all children, regardless of where they attend school. That the provision of such services has a valid secular purpose is well recognized. *See Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Wolman* v. *Walter*, 433 U.S. 229 (1977). The application of the "three-part" test has placed too little emphasis on its secular purpose prong. Save in rare instances,[24] the decisions seem routinely to acknowledge a secular purpose exists, preoccupied by the difficult considerations inherent in the "primary effect" and "excessive entanglement" questions.[25] As Chief Justice Marshall suggested, the requisite constitutional analysis requires a balancing of the state's interest and constitutional authority, and authentic Establishment Clause values.

Education is perhaps the most important function of state and local governments. *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954); *see Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972). An educated citizenry "is essential to the political and economic health of any community." *Mueller* v. *Allen*, 103 S.Ct. 3062, 3067

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[24] *See Stone* v. *Graham*, *per curiam*, 449 U.S. 39 (1980) (purpose for posting Ten Commandments in public school classrooms was religious).

[25] *See Tilton* v. *Richardson*, 403 U.S. 672, 678-79 (1971); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 754 (1976).

(1983). The existence of free public schools in every state attests to the importance of education. In creating the U.S. Department of Education, the Congress found that "education is fundamental to the development of individual citizens and the Nation,"[26] and that "in our federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems."[27] The Court has recognized "the vital role of education in a free society." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 31 (1973).

It is also clear that governmental interest in education extends to all children, regardless of where they attend school. Over fifty years ago this Court recognized the "power of the state to compel attendance at some school and to make reasonable regulations for all schools." *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923). In upholding the state loan of textbooks to children attending private schools, the Court noted that the expenditure of funds for such books was for a public purpose and that the state's "interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 375 (1930). A state has "a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." *Wolman* v. *Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, etc.).

For all practical purposes, the private schools (church-related or not) in our nation are an important part of the total educational apparatus which serves the public interest. Indeed, the diversity they bring is itself an important element in the national educational enterprise. Who can rightly deny that when government augments the private endeavor, it serves the public interest and itself by improving the quality of education at the lowest public

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[26] Department of Education Organizaton Act § 101(1), 20 U.S.C. § 3401(1) (1982).

[27] Department of Education Organization Act § 101(4), 20 U.S.C. § 3401(4) (1982).

expense? When government's self-interest moves it to cooperate with private schools in their educational partnership, through means which have no objectionable religious content, only the most superficial or hostile view of the facts will perceive offense to authentic constitutional values. Of course, one may speculate about possibilities of constitutional abuse where there is none in fact, but that is precisely the target of Chief Justice Marshall's admonition. Speculation should not be allowed to transform a public endeavor into objectionable religious sponsorship through an attenuated notion of Establishment Clause values.

2. "Primary Effect" and "Excessive Entanglement"—Identifying Demonstrated and Concrete Threats To Establishment Clause Principles.

State and local governments should not be prevented from pursuing their legitimate secular purposes except where a demonstrated and concrete threat to authentic constitutional values exists. The validity of "primary effect" and "excessive entanglement" tests lies in their service to those values.

a. "Primary Effect"—A Term Of Uncertain Application.

The general principle of the cases is that a legislative enactment does not contravene the Establishment Clause if its "primary effect" neither advances nor inhibits religion. *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646, 653 (1980). Properly so, the Court's concern is with those governmental actions which pose a real danger of establishing religion in the historical sense. *See Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984). "[W]e are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights . . . The risk of significant religious or denominational control over our democratic processes . . . is remote . . . and such risk is entirely tolerable in light of the continuing oversight of this Court." *Mueller* v. *Allen*, 103 S. Ct. 3062, 3069 (citation omitted) (1983). Thus, the proper job of the "primary effect" test in Establishment Clause analysis is to identify those governmental actions which pose a realistic threat of governmentally established religion.

In practice, the "primary effect" test has resulted in the invalidation of some programs involving no concrete threat of establishing religion within the meaning of the Establishment Clause. For example, programs have been invalidated which provided payments for certain state-mandated services [*Levitt* v. *Committee For Public Education And Religious Liberty*, 413 U.S. 472 (1973)], loans of secular instructional materials and equipment (*e.g.*, maps, charts, and laboratory equipment) [*Meek* v. *Pittenger*, 421 U.S. 349, 365 (1975)], and field trip transportation to government and cultural centers [*Wolman* v. *Walter*, 433 U.S. 229, 254 (1977)]. All were thought to have the impermissible primary effect of advancing religion, although there was no showing that any of the benefits were used for religious purposes.

The elusive meaning of "primary effect" not only leads to the unnecessary invalidation of important educational programs, but it has led to conflicting results[28] which greatly complicate the jobs of legislators and administrators.[29] There are a few difficulties with the term "primary effect." One is the degree of subjectivism which it allows when it is not rooted firmly in authentic constitutional values, *and* a requirement of a demonstrated, concrete threat to those values. A second, which is related to the first, lies in the usage of words. Does primary mean "principal," or "most important?" Does it also connote purpose? There is some of each in the cases. The *Nyquist* case exemplifies the latter, although the "secular purpose" prong seems the appropriate analytical niche to judge purpose.

The essential problem stems from Justice Black's broad assertions concerning "aid to religion" and "separation" which dominate the Establishment Clause analysis in the seminal case of

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[28] Cf. *Committee For Public Ed. And Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794 (1973), with *Mueller* v. *Allen*, 103 S. Ct. 3071 (1983) (both cases involved unrestricted tax benefits for parents of children attending church-related schools); cf. *Meek* v. *Pittenger*, 421 U.S. 349, 365-67 (1975), with *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646, 657 (1980) (both cases involved direct secular aid to church-related schools).

[29] *See* Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 Journal of Law and Education 101 (1974).

Everson v. *Board of Education*, 330 U.S. 1, 15-16 (1947), and which became entrenched a year later in *McCollum* v. *Board of Education*, 333 U.S. 203, 210-11 (1948). The importance of the generative history of the Establishment Clause was lost by its omission from the briefs filed in *Everson*, and the lack of discussion in the *McCollum* majority opinion (Black, J.) although the history was fully briefed by the appellees. When that history was discussed fourteen years later in *McGowan* v. *Maryland*, 366 U.S. 420, 440-42 (1961), its significance had become severely blunted. To the authentic objectives of the Establishment Clause, the *Everson* opinion established the roots of another couched in terms of aid to religion. The abiding effect was an anguished tension between the common sense and tradition of "benevolent neutrality" toward religion, and the frustration of the will of the people more than authentic Establishment Clause objectives could reasonably require.

Such results proceed, in part, from undue emphasis upon the participation of religious groups in public educational programs. That focus can distort the analysis and lead to inevitable invalidation under the Establishment Clause. *See Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1362 (1984). Evaluation of the effect of a challenged program should focus on the government's role in the program because *governmental* establishment of religion is the object of the strictures of the Establishment Clause. The Court has recently emphasized the importance of interpreting the Establishment Clause in accordance with "what history reveals was the contemporaneous understanding of its guarantees." *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984); *see also*, *Mueller* v. *Allen*, 103 S. Ct. 3062, 3069 (1983); *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3334 (1983). Assuredly, this will provide the stability and principled content which Establishment Clause law requires.

To assess accurately the "contemporaneous understanding" of the Establishment Clause, it is as necessary to reflect the framers' accommodation of religious groups as it is to honor their concerns. Accommodation between government and religion is not only permitted but, in some circumstances, is required by the Constitution. *See Zorach* v. *Clausen*, 343 U.S. 306, 314 (1952);

Lynch v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984). The Establishment Clause was not intended to limit governmental action not involving actual or threatened governmental establishment of religion. This is illustrated vividly by contemporaneous actions of the First Congress.[30] Congress authorized the appointment of paid chaplains just three days before final agreement was reached on the language of the Bill of Rights. *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3333 (1983). On the same day, the House passed a resolution requesting the President to set aside a Thanksgiving Day to acknowledge "the many signal favors of Almighty God." *Id.* at 3334, n.9. On August 7, 1789 Congress re-enacted the Northwest Ordinance which in Article III, provided in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[31]

Other early actions of the federal government illustrate the compatibility of the principle of accommodation with authentic Establishment Clause values. On three occasions Thomas Jefferson extended a 1796 act which had authorized the issuance of patents, without payment, for three tracts of land to the Society of the United Brethren for propagating the Gospel among the Heathen.[32] Jefferson also recommended that the various religious sects be allowed to establish schools of theology on the confines of Virginia's public university. *See McCollum* v. *Board of Education*, 333 U.S. 203, 245-6 (1948) (Reed, J., dissenting). From the beginning of the republic until 1895 it was the practice and policy of the federal government to encourage the education of Indians through the work of religious organizations. Funds to support schools operated by various denominations were appropriated both from general appropriations acts and treaty obligations. *See Quick Bear* v. *Leupp*, 210 U.S. 50 (1908).

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[30] Acts of the First Congress are contemporaneous and weighty evidence of the true meaning of the Constitution. *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3334 (1983).

[31] Ch. VIII, 1789 Stat. 50, 53; C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* 126 (1963).

[32] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction*, 41-46 (1982.)

The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom. Recognizing this, the Court has consistently rejected the proposition that any program which aids a religiously affiliated institution in some manner violates the Establishment Clause. *Mueller* v. *Allen*, 103 S. Ct. 3062, 3065 (1983). This has been true even where the aid has been substantial. *See Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (property tax exemption for churches); *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646 (1980) (direct payments to church-related schools for certain state mandated services).

Fairly judged, a bona fide public act or program intended to promote the education of youth will necessarily have a truly primary ("principal," "most important") effect in accord with its purpose, and will not offend authentic Establishment Clause values except in rare cases involving impermissible ulterior motives or extraordinary collateral effects.

b. Role Of Excessive Entanglement In Establishment Clause Analysis.

Excessive government entanglement with religion was added as the third distinct prong of the three-part test in *Lemon* v. *Kurtzman*, 403 U.S. at 612-13. The roots of excessive entanglement as part of Establishment Clause analysis are found in *Walz* v. *Tax Commission* where the Court stated: "[W]e must also be sure that the end result [of property tax exemptions for churches]—*the effect*—is not an excessive government entanglement with religion." 397 U.S. at 674 (emphasis added). The application of the excessive entanglement test involves consideration of the same factors that are examined under the "primary effect" test. *See Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 755-63 (1976). Justice White observed in *Roemer* that there is "no reason to indulge in the redundant exercise of evaluating the same facts and findings under a different label." 426 U.S. at 769 (White, J., concurring in judgment). This proceeds from the fact that the test is a product of a concern over the "effect" of challenged programs.

In *Meek* v. *Pittenger*, remedial secular instruction provided to children in nonpublic schools (the majority of which were church-related) was invalidated under the excessive entanglement test. 421 U.S. 349, 370 (1975). In *Wolman* v. *Walter*, that test was failed by the provision of transportation to nonpublic school students for field trips to "governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students." 433 U.S. 229, 253-55 (1977). In neither *Wolman* nor *Meek* was there any actual, governmental surveillance of any religious activity. Rather, it was the perceived need to require comprehensive surveillance to insure secularity in the challenged programs that led to their downfall under the excessive entanglement test. *Wolman* v. *Walter*, 433 U.S. at 254; *Meek* v. *Pittenger*, 421 U.S. at 370. Chief Justice Burger succinctly described this perception in *Meek:*

> "There is absolutely no support in this record or, for that matter, in ordinary human experience for the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the educational process—especially remedial tools—to students in private schools."

421 U.S. at 385 (Burger, C. J., dissenting in part). More recently, however, the Court has avoided the complications arising from a judicial insistence on a surveillance mechanism. *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646, 661-62 (1980).

The results in the cited cases exemplify the mischief caused when conjecture and unsupported fears creep into the constitutional analysis, contrary to Chief Justice Marshall's admonition in *Fletcher* v. *Peck*, *supra*. The excessive entanglement test should be concerned only with government's *actual* involvement, and the necessary implications of that involvement. The ultimate concern of excessive entanglement is with "the resulting relationship between the government and the religious authority." *Lemon* v. *Kurtzman*, 403 U.S. 602, 615 (1971). Entanglement is excessive when the government engages in "comprehensive, discriminating, and continuing state surveillance" of activities within religious institutions. *Mueller* v. *Allen*, 103 S. Ct. 3062, 3072 (1983).

Extensive government monitoring and surveillance of religious institutions could result in governmental direction of, or control over, purely religious matters. Governmental direction of religious activities would raise obvious Free Exercise and Establishment Clause concerns, the former if it interfered with the practice of religious beliefs, and the latter because significant government involvement tantamount to control could lead to an established religion. Properly applied, therefore, the excessive entanglement test can serve legitimate Establishment Clause values. However, it should not be the gratuitous foe of educational programs which are untainted in fact by constitutional excess.

II

THE GRAND RAPIDS PROGRAMS POSE NO REAL THREAT TO AUTHENTIC ESTABLISHMENT CLAUSE VALUES. THEY SATISFY THE COURT'S THREE-PART TEST, PROPERLY ROOTED IN THOSE VALUES.

The Court of Appeals held unconstitutional the Shared Time and Community Education classes ("Program") offered by the School District of the City of Grand Rapids ("School District") to nonpublic school students in classrooms leased from church-related schools *Americans United For Separation Of Church And State* v. *School District, Etc.*, 718 F.2d 1389 (6th Cir. 1983). The Program poses no real threat as a government establishment of religion and satisfies the three-part *Lemon* test used by the Court in school aid cases. The Court of Appeals erred in holding that the Program violated the Establishment Clause of the First Amendment.

In carrying out its public responsibility for providing quality education to all children in the community, the School District offered certain secular courses[33] to children attending nonpublic, church-related schools. The courses are taught by public school employees[34] in classrooms leased from the nonpublic schools

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[33] Classes offered under the Program included instruction in math, reading, art, music, physical education, and arts and crafts. 718 F.2d 1389, 1392 (1983).

[34] Although some of the teachers in the Program also teach at nonpublic schools, they are, nonetheless, employees of the School District subject to supervision of public school officials in the Program. 718 F.2d at 1402.

which are affiliated with several different religious denominations. The record demonstrates that in the Program's six years of operation, no teacher in any class in the Program attempted to indoctrinate any student in religion. 718 F.2d at 1404. The secular courses offered in the Program are similar to those already being offered in the public schools of the School District.

The provision of secular courses under the Program threatens no authentic Establishment Clause value. By making the courses available at schools of various denominations, the Program is free from the kind of official denominational favoritism that the Establishment Clause was primarily intended to prevent. *See Larson* v. *Valente*, 456 U.S. 228, 244 (1982). The total absence of religious instruction from any of the offered classes eliminates any cognizable risk of government involvement in teaching the religious values or dogma of a particular religion. No government imprimatur of approval of religion is involved in the Program [*see Mueller* v. *Allen*, 103 S. Ct. 3062, 3068 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981)], nor is the religious freedom of any individual or institution endangered in any way. For the reasons that follow, the Program is well within the requirements of the "three-part" test, properly rooted in authentic constitutional values.

Secular purpose.

There can be no question that the Program has a valid secular purpose. The court below so found. 718 F.2d at 1398. The School District has a strong interest in providing quality educational services to children within its jurisdiction. Providing services to children attending church-related schools in the community is simply a part of the broader, overall educational responsibility the School District has undertaken in the public interest (discussed *supra* at 17-19).

Primary effect.

Whether viewed separately or in the larger context of the totality of educational programs offered by the School District, the Program's primary effect neither advances nor inhibits religion. In its actual operation there is no indication that the Program did anything but accomplish the School District's important objective of providing classes in secular courses. Providing the classes at the schools regularly attended by the children is entirely consistent with the Constitution which "affirmatively mandates accommodation . . . of all religions.[35] *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984). There is no evidence that religion or religious values ever entered into any of the classes taught under the Program. The total absence of religious content from the Program eliminates any *cognizable* risk that classes may be used to advance religion. In Chief Justice Marshall's words, "slight implication and vague conjecture" do not present a cognizable risk.

That church-related schools, and in some instances their teachers, may derive some benefit from the Program does not change this conclusion. *See Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646 (1980). In *Regan*, which involved direct state payments to church-related schools, the Court held that where it could be shown with sufficient clarity that the payments served the state's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views, the payments did not have the primary effect of advancing religion. 444 U.S. at 663. The same result should obtain here.

Excessive entanglement.

The Program has operated without the kind of "comprehensive, discriminating, and continuing state surveillance necessary to run afoul" of the excessive entanglement prong of the three-part test. *Mueller* v. *Allen*, 103 S. Ct. 3062, 3071 (1983). In fidelity to the counsels of Chief Justice Marshall, the Court should not read into the Program "as an inevitability the bad faith upon which any future excessive entanglement would be predicated." *Committee For Public Ed., Etc.* v. *Regan*, 444 U.S. 646, 660-61

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[35] The question of whether the challenged classes could have been provided elsewhere is not relevant here. The issue is whether the Program, as operated, violates the Establishment Clause. *See Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1363 n.7 (1984).

(1980). If constitutionally offensive practices should occur in the future, they "can be dealt with 'while this Court sits.' " *Walz* v. *Tax Commission*, 397 U.S. 662, 678 (1970).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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